

also pointed out that the evidence adduced by the prosecution does not prove that any specific quantity of foreign currency has been lost to the Colony.

But counsel for the defendant company seeks to carry his plea in mitigation further. He submits that I should proceed upon the assumption that the defendant company and its directors acted throughout in good faith and that I should assess the penalty for these 34 offences on that basis. I am quite unable to accede to this submission. In the first place, I have to bear in mind that the defendant company has a previous conviction for selling large quantities of U.S. dollars in 1951. The defendant company pleaded guilty in that case and the record shows that on that occasion also their counsel put forward the plea that the company had acted in good faith and in the honest belief that they were entitled to do what they did. The present case has a number of features in common with the previous case. Again there is a company in Bangkok, though it bears a different name, and again the defendant company claims to be acting merely as agent for the Bangkok company in giving instructions for the disposal of U.S. currency in New York. The mechanics of carrying out the transactions in the present case were more elaborate and complicated than in the previous case and I have no doubt that the reason for this was that the defendant company hoped that they would in consequence escape the attention of the Controller. The managing director of the defendant company was asked again and again when he was in the witness box why his company had used an accommodation address in Singapore for receiving cable advices from New York. He was quite unable to give a satisfactory or even a plausible explanation and I have no hesitation in saying that he was attempting to mislead the Court in this matter. The prosecution may not have proved the exact relationship between the defendant company and the Bangkok company in this case but they have certainly satisfied me that the defendant company and its responsible directors were not acting in good faith and in the genuine belief that they were entitled to carry out the transactions which are the subject matter of these charges.

This is therefore a case which calls for a heavy penalty. The substantial fines imposed on the occasion of the previous conviction have not deterred the defendant company from committing further numerous breaches of the foreign exchange control laws. If it should turn out that heavy fines are not sufficient to deter wealthy companies from committing breaches of the foreign exchange control laws, it is well to remember that the Ordinance expressly provides that where a

A company commits an offence, its directors are also deemed to be guilty of that offence unless they can prove that it was committed without their consent or connivance and that they took all reasonable means to prevent its commission; and it should also be remembered that if a director were charged under these provisions he would be liable, on conviction, not merely to a fine but to imprisonment.

B On the previous occasion when the defendant company was convicted the Court imposed a heavy fine of \$420,000. Bearing this in mind and having regard to the number of occasions and the large sums involved in the present charges, I consider that a substantially heavier fine, at least double that which was imposed on the previous occasion, should be imposed in this case. I therefore impose fines totalling \$850,000, that figure being the aggregate of a fine of \$25,000 which I impose on each of the 34 charges.

Order accordingly.

Solicitors: Allen & Gledhill.

# GAN SIN TUAN v. CHEW KIAN KOR

[C.A. (Thomson C.J., Whyatt C.J. (S) and Hill J.)  
June 20, 1957]

[Penang — F.M. Civil Appeal No. 42 of 1956]

E *Companies — Private Company — Contract to sell shares in private company contrary to articles of association — Contract void — Whether contract takes effect as sale of equitable rights.*

F On January 28, 1950 the appellant and respondent entered into an agreement whereby the appellant agreed to sell to the respondent his holding of 2,340 shares in the United Traction Company Ltd. for the sum of \$46,800. The United Traction Company Ltd. was a private limited company and its articles of association contain restrictions on the transfer of shares, the effect of which was to require a proposing transferor to give notice to the company of his intention to transfer his shares, and thereafter to constitute the company his agent to sell the shares to other members of the company or other persons selected by the company, at a value fixed by the auditors, and only if the company failed to find a purchaser, was the proposing transferor at liberty to sell his shares to any person at any price. Both the appellant and the respondent knew of the restrictions in the articles of the company. The respondent duly paid the purchase money and the appellant handed to him the share certificate in respect of the shares. The appellant refused to execute a transfer of the shares and on August 21, 1953 his solicitors wrote to the respondent stating that as the agreement for the sale of the shares was contrary to the articles of association, it was bad in law and therefore the appellant could not transfer the shares but would return the purchase price of \$46,800. The respondent however refused to accept the return of the purchase price and eventually brought an action claiming specific performance of the contract to sell the shares or further or alternatively a declaration that the appellant was a trustee of the shares or further or alternatively damages for breach of contract. The trial Judge held that the appellant had entered into a valid contract to sell the shares for which he received the purchase price. He

then held that because of the articles of association of the company it would be inequitable to order specific performance of the contract of sale of the shares having regard to the rights and interests of the remaining shareholders. He held however that by reason of the contract of sale and receipt and payment of the purchase price the equitable and beneficial interests in the shares passed from the appellant to the respondent and granted a declaration that the appellant was a trustee for the respondent of the shares.

Held: (Whyatt C.J. (S) and Hill J., Thomson C.J. dissenting): (1) the agreement for sale of shares made contrary to the restrictions of sale imposed by the articles of association of the company was void and no rights, legal or equitable, arose between the appellant and the respondent under it;

(2) the sale purported to be a sale of the legal and equitable rights in the shares and could not be treated as a valid sale of equitable rights of the shares only.

Cases referred to:—

- (1) *Hawks v. McArthur* (1951) 1 All E.R. 22.
- (2) *Hunter v. Hunter* (1936) A.C. 222.
- (3) *Re Hafner* (1943) I.R. 426.
- (4) *Harrold v. Plenty* (1901) 2 Ch. 314.
- (5) *Borland's Trustee v. Steel Bros. & Co. Ltd.* (1901) 1 Ch. 279.
- (6) *Greenhalgh v. Mallard* (1943) 2 All E.R. 234.
- (7) *Loring v. Davis* 32 Ch. D. 625.
- (8) *Day v. Singleton* (1899) 2 Ch. D. 320.

In the Court below the following judgment was delivered:

**Rigby J.:**—In this action the plaintiff's substantial claim was originally for specific performance of an option to purchase, dated the 16th January, 1950, given by the defendant to sell to the plaintiff 2,340 shares which the defendant holds in the United Traction Co. Ltd., which option was duly exercised.

The facts of the case really present no difficulty.

In 1950, the plaintiff and the defendant were directors and founder members of the United Traction Co. Ltd., a private Company limited by shares and incorporated in September, 1947. The issued capital of the Company was then 12,000 \$10 shares, of which the plaintiff and the defendant each held 2,340 shares.

On the 16th January, 1950 the defendant gave to the plaintiff an option in writing offering to sell him his 2,340 shares for the sum of \$46,800. The option was to be valid till the 30th January, 1950.

In furtherance of the exercise of that option, on the 28th January, 1950, the parties entered into a formal contract in writing, whereunder the defendant received from the plaintiff the sum of \$8,000 as an advance payment, and it was further agreed that the balance of \$38,800 was to be paid within two months i.e. before the 28th March, 1950. The contract further contained reference to agreed sums of money to be paid by way of liquidated damages in the event of either

A party failing to complete his part of the agreement. Having regard to the view I take of this case it is unnecessary for me to refer any further to those damages.

It is admitted that the defendant received the balance of the purchase price within the time limit stipulated, and it is admitted that, for reasons to which I shall refer, the defendant failed to transfer, or secure the transfer of, those shares into the plaintiff's name.

It is abundantly clear that thereafter the affairs of the Company flourished and prospered and the dividends paid to shareholders were such as must inevitably arouse the envy and admiration of even the most speculative of investors.

The defendant, however, despite repeated requests from the plaintiff, made no attempt to transfer the shares or to give notice in writing to the Company of his desire so to transfer them. He retained the shares, the dividends paid thereon, and the \$46,800 he had received as payment for the shares.

In August, 1953 the plaintiff, through his Solicitors, gave Notice of Action to the defendant requesting him to obtain the necessary sanction for the transfer of the shares and also demanding from him payment "of the sum of \$45,396 being the amount of the dividends on the said shares from 7th September 1950 to 3rd March 1953" paid to the defendant by the Company.

On 21st August, 1953 the defendant, through his Solicitors, replied in the following terms:—

"With regard to your Notice of Action dated 14.8.53 to my client, I am instructed by him to reply as follows:—

(1) The contract to sell my client's shares in the United Traction Co. Ltd. to your client was made contrary to Article 20 of the Articles of the Company and hence my client will not comply with the request to obtain the sanction of the Company for the transfer of his 2,340 shares in the said company to your client.

(2) The dividends received by my client belong to him and not to your client as the purported contract is bad in law.

(3) By reasons aforesaid, my client is not bound by the said contract as your client is well aware, he (your client) being also a big shareholder in the said Company and conversant with the Articles thereof.

Please let me know if your client will receive back the sum of \$46,800 he paid to your client for the purported sale which cannot be performed because of Article 20 aforesaid. Please let me have a reply by 7 days if your client wishes to have his money back."

Article 20 of the Articles of Association of the Company reads as follows:—

#### "TRANSFER OF SHARES.

20. No share shall be transferred to any person whether a member of the Company or not, except subject to the following conditions:—

(1) Except where the transfer is made pursuant to Clauses (6) or (7) of this Article the person proposing to transfer any share (hereinafter called 'the proposing transferor') shall give notice in writing (hereinafter called 'a transfer notice') to the Company that he desires to transfer all the shares held by him. Such notice shall

constitute the Company his agent for the sale of all the shares in the Company of the proposing transferor to any member of the Company or to any person selected by the Company as one whom it is considered desirable in the interests of the Company to admit to membership willing to purchase the same (hereinafter called 'the purchasing member') at the fair value to be fixed in accordance with Clause (2) of this Article. A transfer notice may include several shares, and in such case shall operate as if it were a separate notice in respect of each. A transfer notice shall not be revoked except with the sanction of the Company.

(2) The fair value aforesaid shall be fixed by the Auditors of the Company for the time being, who, at the request of the Directors shall certify in writing the sum which, in their opinion, is the fair value of a share, and such certificate shall be conclusive and binding on all parties and such sum shall be deemed to be the fair value, and in so certifying the Auditors shall be considered to be acting as experts and not as Arbitrators, and the Arbitration Ordinance of the Straits Settlements, the Arbitration Enactment of the Federated Malay States and any similar legislation in force for the time being in Malaya shall not apply.

(3) The Company shall offer any shares specified in the transfer notice to all members and in case more than one member shall notify the Company of his desire to purchase such shares they shall be divided as nearly as may be between all members desiring to purchase in proportion to the number of shares already held by them respectively. If only one member shall be desirous of purchasing he shall be the purchaser. If no member shall be desirous of purchasing the Company may select any person to be the purchaser whom they consider to be a person within the definition of 'purchasing member' in Clause (1) of this Article..

(4) If the Company shall, within the space of two months after being served with a transfer notice, find a purchasing member and shall give notice thereof to the proposing transferor, he shall be bound, upon payment of the fair value aforesaid, to transfer such share to the purchasing member.

(5) If in any case the proposing transferor, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money and the Directors may nominate some person to execute a transfer of such share in the name and on behalf of the proposing transferor, and on such transfer being executed by the purchasing member may cause the name of the purchasing member to be entered in the register as the holder of the share and shall hold the purchase money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member and after his name has been entered on the register in purported exercise of the aforesaid power, the validity of the proceedings shall not be questioned by any person.

(6) If the Company shall not within the space of 2 months after being served with a transfer notice find a purchasing member and give notice in manner aforesaid, the proposing transferor shall at any time within three months thereafter be at liberty, subject to Clause (3) of this Article, to sell and transfer the share (or where there are more shares than one, those not placed) to any person and at any price.

(7) Any share of a deceased member may subject to Article 4(a) of these Articles be transferred by his legal personal representative to the person or persons entitled to the same under the will or on the intestacy of such deceased member.

(8) The Directors may refuse to register any transfer of a share (a) where the Company has a lien on the share, or (b) where the Directors are not of opinion that it is desirable to admit the proposed transferee to membership, but paragraph (b) of this clause shall not apply where the proposed transferee is already a member or such person as is set out in Clause (7) of this Article."

The plaintiff admits that he was aware of the restrictive conditions imposed by Article 20 on the

A transfer of shares at the time of the contract. He states, however, and I accept it as a fact, that it was the defendant who approached him to buy the shares because he was in need of money. I am further satisfied — although I think it is irrelevant to the issue for consideration — that the price paid of \$20 per \$10 share was a fair and reasonable price at the time of the making of the contract.

On the evidence, I am left in no doubt that the defendant, of his own volition, entered into a valid contract to sell his shares to the plaintiff and that in pursuance of that contract he received the full purchase price for those shares.

I do not believe the evidence of the defendant when he says that it was agreed between them that the plaintiff was to take steps to see the transfer of the shares was effected; nor do I believe him when he says that it was verbally agreed between them that no benefit in the shares should pass until the transfer had been completed. On the contrary, I accept and believe the evidence of the plaintiff that it was mutually agreed between them at the time of entering into the agreement that the defendant was to take the necessary steps to have the shares transferred to the plaintiff. Under Article 20 it was the duty of the defendant, as transferor, to give notice in writing to the Company that he desired to sell the shares held by him. It is admitted by him that at no time did he ever do so.

On the facts it is, I repeat, abundantly clear that the defendant entered into a valid contract to sell the shares; that he received the purchase price thereon; that subsequent to the sale the shares appreciated very considerably in value; and that the defendant, for that reason, is now reluctant to part with the shares and that he accordingly seeks to hide behind the provisions of Article 20 of the Articles of Association.

Whilst dealing with the facts there is one further matter to which I ought, perhaps, to refer, although I attach little or no importance to it. A document, dated the 9th March, 1954, was produced in evidence by the plaintiff. That document reads as follows:—

"Butterworth, P.W..

9th March, 1954.

Mr. Chew Kean Kor,  
7, Abou Sittie Lane,  
Penang.

Dear Sir,

With reference to the transfer of my 2,340 shares in the United Traction Co. Ltd., Butterworth, I hereby agree to obtain the necessary approval of the Company to make the transfer to you in the near future.

As regards the dividends paid to me from the Company from the time the shares sold to you to date, I hereby agree to refund to you the actual amount of dividends (certified by the Company) received by me; the first payment of Dollars twenty five thousand (\$25,000 only) will be made to you within two weeks from date and the balance within three months.

Yours faithfully,  
(Signed) Gan Sin Tuan.

(Signed) Lim Seng Chye,  
Translated by me."

The plaintiff states that that document was voluntarily given to him by the defendant, in the Company's Head Office at Butterworth, after it had been interpreted into English and typed out by one Lim Seng Chye, a clerk in the office, at the dictation of the defendant. The defendant, on the other hand, states that he was compelled by the plaintiff and three other persons, under duress and threat to his life, to sign that document. It is clear that the next day, the 10th March, 1954, he made a report to the Police and lodged a sworn complaint with the Magistrate that he had been compelled by the plaintiff and his friends, under fear of death, to sign this document. At the same time, through his Solicitors, he wrote to the plaintiff's Solicitors, giving details of the circumstances in which, under duress, he alleged he had been compelled to sign this document and repudiating the document.

The only evidence in this matter consists virtually of the testimony of the defendant against that of the plaintiff. It seems curious that the clerk, Lim Seng Chye, who had allegedly prepared the document, was not called by one side or the other to give evidence as to the circumstances in which it had been prepared. Again, it is curious that this document was, at no time referred to in the Statement of Claim but only adverted to in the Statement of Defence. No doubt the reason for this was that the plaintiff's Solicitors were content to rest their case on the basis of the admitted contract of sale, delivery of the purchase price, and non-delivery of the shares forming the subject matter of the sale. However, on the balance of probabilities, having regard to the fact that prior to the letter the defendant, through his Solicitors, had declined to transfer the shares or the dividends received, and bearing in mind the defendant's subsequent conduct in complaining to the Police and to the Magistrate that he had been criminally intimidated and repudiating the letter through his Solicitors, I think it probable that the letter was, in fact, written under duress, and I accordingly disregard it. In any event, as I have said, on the view I take of this case, I attach little or no importance to the letter. So much for the facts of the case.

A It is clear that the Court can grant a decree for specific performance of a contract to sell shares. (See *Chitty on Contract*, 20th edition, page 390). It is equally clear, in my view, that there was in this case a valid contract by the defendant to sell his shares in this Company to the plaintiff. How is the position affected by the restrictions imposed by Article 20 on the transfer of shares? It is apparent that the effect and, no doubt, the purpose of that Article is to ensure that when a shareholder wishes to sell his shares they shall be offered for sale through the Company, so that all the remaining shareholders may be given an equal opportunity, in proportion to the number of shares already held by them, to purchase those shares. The object of this procedure, no doubt, is to prevent, as far as possible, any one shareholder from acquiring an overriding interest in the affairs of the Company by buying up the shares of other shareholders by direct purchase of their interests from them.

D Specific performance is, of course, an equitable relief. The plaintiff was well aware of the existence of Article 20 at the time he entered into this contract. In my view, therefore, it would be wholly inequitable for me to order specific performance of the contract of sale of the shares, having regard to the rights and interests of the remaining shareholders as expressly prescribed by Article 20.

F On the other hand, the defendant having entered into a valid contract of sale and having received, and retained, the purchase price thereof, I think it would be equally inequitable that he, as against the purchaser, should retain the equitable interests from those shares.

G The position in law arising in such circumstances appears to be concisely set out in *Halsbury's Laws of England*, 3rd edition, volume 6, page 252, where it is stated:—

"A transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares therein comprised."

H The case of *Hawks v. McArthur*<sup>(1)</sup> is cited in support of the above proposition. The salient facts of that case, and the principles of law arising therefrom, bear so much in common with the instant case that I think it desirable that I should refer to those facts. They were briefly as follows:—

I The defendant McArthur held 500 shares in a private Company. In August, 1949 he sold 200 of those shares to a Mr. Roberts and the remaining 300 to a Mr. Fraser. The transfers were duly executed, but the names of Messrs. Roberts and Fraser were not entered upon the Register of Members. The Articles of the Company conferred upon the Directors an

absolute discretion to refuse to register any transfer and provided further that notice of intending transfer should be given by the vendor and, on receipt thereof, the Board should forthwith give notice of the intended transfer to all members stating, *inter alia*, the price of the shares to be sold (such price to be agreed by the vendor and members or, in default of agreement, to be fixed by the auditors) and invite each member to state whether he wished to purchase any and, if so, how many of the shares. They further provided that no shares should be transferred unless and until the rights of pre-emption of the members had been exhausted. These requirements had not been complied with when the shares were sold by McArthur to Messrs. Roberts and Fraser.

In October, 1949 the plaintiff Hawks recovered judgment against McArthur for £539 odd and, at the same time, obtained a charging order on these 500 shares in the Company which were still standing in McArthur's name. Messrs. Roberts and Fraser claimed that the beneficial interests in the shares were in them and that McArthur had no interest on which the charging order could operate.

It was held that — and I quote from the headnote of the case — “notwithstanding the complete failure to comply with the Company's Articles in regard to the procedure to be followed before shares could be transferred, Messrs. Fraser and Roberts, having paid to McArthur the full consideration for the shares, had obtained equitable rights therein . . . . .”

In the course of his judgment Vaisey, J. distinguishes the case of *Hunter v. Hunter*<sup>(2)</sup>, which case was relied on by Mr. Ong Huck Lim, Counsel for the defendant in the case now before me, and goes on to say:—

“On general principles, in such circumstances as those of the present case where a man who has an interest in shares in a Company receives something for the sale of those shares and executes under seal a transfer of those shares for that purpose, I cannot bring myself to suppose that *Hunter v. Hunter* constrains me to hold that everything done in that transaction is a complete nullity . . . . . The one thing, however, which seems to me to be important is that they (Messrs. Fraser and Roberts) paid Mr. McArthur the money, and I cannot bring myself to suppose that they got nothing by their bargain and that the whole property in the shares remained in Mr. McArthur, notwithstanding the transfers which had been executed and the money which he received.”

Mr. Ong Huck Lim seeks to distinguish the case of *Hawks v. McArthur*<sup>(1)</sup> from the case now before me, in that he says that that case deals with a charging order and the order of priority of equitable interests. That, no doubt, is true. But it seems to me that the same principles apply in the case now before me. Here there was a valid contract of sale of the shares, which were the personal property of the defendant.

A Although, in my view, I cannot, and ought not, to grant equitable relief by ordering the transfer of the shares from the defendant to the plaintiff since it would affect the rights and interests of the remaining shareholders by depriving them of their rights of pre-emption expressly reserved to them by Article 20, as between the defendant and the plaintiff I am of the opinion that I ought to hold, and I do hold, that by the contract of sale and receipt of payment of the purchase price the equitable and beneficial interests in the shares passed from the defendant to the plaintiff.

B I hold, therefore, that the defendant, since the 4th February, 1950, being the date of payment of the balance of the purchase price due under the contract, has been, and still is, the trustee for the plaintiff of the 2,340 shares comprised in Certificate No. 5 held by the defendant in the United Traction Co. Ltd. and of all dividends and all other rights and benefits received or to be received hereafter by the defendant in respect of those shares.

There must accordingly be judgment for the plaintiff against the defendant in terms of Prayers (e), (f), (g) and (j) in paragraph 9 of the Statement of Claim, to wit:—

- E (e) A declaration that the Defendant is and has been since the 4th day of February, 1950 trustee for the Plaintiff of the said shares and of all dividends and all other rights and benefits received or to be received hereafter by the Defendant in respect of the said shares.
- F (f) An account of all dividends and all other rights and benefits received by the Defendant in respect of the said 2,340 shares from the 4th day of February, 1950.”
- (g) An order for payment by the Defendant to the Plaintiff of all sums found due on taking such account and of such sums as may hereafter be received by the Defendant.
- (j) Costs.

Costs of this action to be paid by the defendant.

G In Prayer (h) of paragraph 9 of the Statement of Claim the plaintiff asks for an order removing the defendant from his office as trustee and appointing some suitable person or corporation in his stead. At the request of the plaintiff I expressly leave this matter open for further consideration, should it be found necessary.

H Upon application of plaintiff's Counsel the \$46,800 paid into Court by defendant, to be paid out to the plaintiff forthwith, on account of dividends.

*The defendant appealed.*

#### COURT OF APPEAL.

I F. G. Pooley and Ong Huck Lim for the appellant.  
Marcus Knorpel for the respondent.

*Cur. Adv. Vult.*

Thomson C.J. :—The plaintiff and the defendant in this case are substantial shareholders in and

were among the original subscribers to the United Traction Company Limited, a company incorporated under the Companies Ordinance, 1940.

The transfer of shares in the company is governed by Article 20 of the Articles of Association. That article provides :—

"No share shall be transferred to any person whether a member of the company or not, except subject to the following conditions:—"

The main provisions of the conditions which follow may be summarised as follows. A member proposing to transfer his shares must give notice to the company to that effect. "Such notice shall constitute the company his agent for the sale" of the shares. The shares are then to be valued by the Auditors of the Company and to be offered at a price thus determined to the other members of the Company. If one member of the Company desires to purchase them at the price in question he may do so. If more than one member desire to purchase them, such members may do so in proportion to their existing holdings. If no member desires to purchase them, the company may offer them to any person it may select as a suitable member of the company. If within two months the Company finds a purchaser in accordance with these provisions, the shareholder proposing to sell must transfer his shares to the person in question. If the Company fails to find a purchaser within two months, the shareholder may sell and transfer his shares to any person at any price.

On 16th January, 1950 the defendant executed a document the material portions of which read as follows :—

"I . . . give this option to Mr. Chew Kian Kor . . . to sell my 2,340 shares (Certificate No. 5) which I hold with the United Traction Company Ltd. . . . for the sum of \$46,800 . . . This option will hold good till the 30th day of January, 1950."

Then, on 28th January, 1950 the defendant executed the following document which was also signed by the plaintiff :—

"Received from Mr. Chew Kian Kor \$8,000 dollars eight thousand only being advance in respect of an option given by me to the said Mr. Chew Kian Kor dated 16th January, 1950. It is further agreed that the above said Mr. Chew Kian Kor is to pay me the balance amount of \$38,800 dollars thirty eight thousand eight hundred within two months i.e. 28th day of March, 1950. If Mr. Chew Kian Kor fails to make a settlement before the stipulated date he will lose the advanced amount of eight thousand and will pay me further amount of \$25,000 dollars twenty five thousand as damages. If I fail to transfer the shares to him whenever he demanded within these two months, I agree to pay him back the advanced amount of eight thousand and a further amount of \$25,000 dollars twenty five thousand as damages to him."

That document bears the following endorsement signed by the defendant and dated 4th February, 1950 :—

"Received from Mr. Chew Kian Kor a further amount of \$30,000 dollars thirty thousand only in respect of an option dated 26th January, 1950 (O.C.B. cheque No. PE/3.076271)."

A It is admitted that the sum of \$46,800 was in fact paid by the plaintiff to the defendant (although it is not clear from the record when the amount of \$8,800 not covered by the documents which have been quoted was paid), and it is also admitted that the defendant has consistently failed and refused to take any steps of any sort whatever to have the shares transferred to the plaintiff although, at any rate since 21st August, 1953, he has apparently been prepared to refund the purchase price of \$46,800 which has now indeed been paid into Court.

C There is one other fact which to my mind is of the very greatest importance but which has not attracted the attention it deserves in the discussion of the case, and that is that at or about the time of the transaction which has been described, the defendant handed to the plaintiff his share certificate (No. 5) in respect of the shares in question.

D After considerable correspondence between the solicitors for the parties, the present proceedings were commenced in 1954. In them the plaintiff claimed specific performance of a contract to sell the shares or further or alternatively a declaration that the defendant was a trustee of the shares or further or alternatively damages for breach of contract. A number of other reliefs were claimed, but it is unnecessary to consider them here. The defendant counterclaimed for the return of the share certificate which he had handed to the plaintiff.

F In the event the trial Judge held that the defendant had entered into a valid contract to sell the shares for which he had received the purchase price. He went on to discuss the provisions of Article 20 of the Articles of Association which have already been mentioned, and observed that the plaintiff was well aware of this Article when he entered into the contract. G He then held that it would be wholly inequitable to order specific performance of the contract of sale of the shares having regard to the rights and interests of the remaining shareholders, but continued :—

H "On the other hand, the defendant having entered into a valid contract of sale and having received and retained the purchase price thereof, I think it would be equally inequitable that he, as against the purchaser, should retain the equitable interests arising from those shares."

I Basing himself on the case of *Hawks v. McArthur*<sup>(1)</sup> he went on to hold that by reason of the contract of sale and receipt and payment of the purchase price the equitable and beneficial interests in the shares passed from the defendant to the plaintiff, and in the event granted a declaration to the following effect :—

"A declaration that the defendant is and has been since the 4th day of February, 1950 trustee for the plaintiff of the said shares and of all dividends and all other rights and benefits received or to be received hereafter by the defendant in respect of the said shares."

In addition, he made orders *inter alia* :—

"That an account be taken of all dividends and all other rights and benefits received by the defendant in respect of the said 2,340 shares from the 4th day of February 1950:

That the defendant do pay to the plaintiff all sums of money found due on taking such account and all sums as may hereafter be received by the defendant in respect of the said shares:

That the counterclaim herein be dismissed . . . . .

That the question of the removal of the defendant from the office of trustee and the appointment of some suitable person or corporation in his stead be left open for further consideration: . . . . ."

Against that judgment the defendant has now appealed, and I do not think I am being unfair when I say that his grounds of appeal amount to this :— that the agreement between the parties was an agreement to sell the shares, but by reason of and for reasons connected with Article 20 of the Articles of Association the agreement was void or unenforceable, and in the circumstances all that the plaintiff was entitled to was a refund of the purchase money which had already been paid into Court.

The case has caused me a great deal of difficulty, but in the event I am compelled to the conclusion that the learned trial Judge was right in the result at which he arrived. It is with great regret that I have to say that I am unable to agree with the judgments that are about to be delivered by the Chief Justice of Singapore and my brother Hill.

Let me repeat what to my mind are the relevant facts. The defendant agreed to sell his shares to the plaintiff at a certain price. It is not suggested that both parties did not enter into that agreement freely and voluntarily. And I think that when they did so they must be taken to have been well aware of the terms of the Articles of Association of the company to which they were both signatories. From the fact that they made the agreement it must be assumed that at the time of making it each of them intended that it should be carried out, and from their knowledge of the terms of the Articles of Association it must be assumed that each of them knew what steps were necessary to carry out. Indeed, this is more than an assumption because it is clear from the wording of the agreement that they appreciated that there was a distinction between selling the shares and transferring them, and it is clear from the correspondence which is in evidence that the plaintiff at any rate far from pressing the defendant to evade the provisions of the articles in any way was pressing him to act in accordance

A with them. Then the purchase money was paid in full and the defendant handed over his share certificate.

B Had the company been a public one the articles of which contained no restrictions on the transfer of shares, there can be no doubt that on the facts which have been stated, the plaintiff would have been entitled to come to the Court and have his bargain enforced without any more ado. As it is, the only question that arises is how far his position is modified by the existence of Article 20 of the Articles of Association.

C I do not think it is unfair to the very careful and helpful arguments to which we have listened on both sides to say that ultimately the case for the appellant rests on the decision of the House of Lords in the case of *Hunter v. Hunter*<sup>(2)</sup> and the case for the respondent rests on the decision of Vaisey J. in *Hawks v. McArthur*<sup>(1)</sup>, *supra*.

D First, I take the case of *Hunter v. Hunter*<sup>(2)</sup> which related to the sale by a mortgagee of shares in a company one of whose articles (Article 17) was in all material respects the same as Article 20 of the Articles of Association of the United Traction Co. Ltd.

E The plaintiff had mortgaged his shares in the company to Lloyds Bank, and steps were taken which were not in accordance with the terms of Article 17 to put the nominees of the Bank on the Register. At a later stage, the nominees of the Bank took steps, which were in accordance with Article 17, to sell the shares to the defendant Harry Hunter. After prolonged litigation which ended in the House of Lords the various transactions in the case were set aside.

F The Lord Chancellor, with him Lord Blanesburgh, Lord Russell of Killowen and Lord Macmillan, held on grounds that have no bearing on the present case that the sale to the defendant which was a sale by a mortgagee was bad by reason of lack of any previous effective demand by the Bank.

H Having so decided, Viscount Hailsham said (at p. 247) :—

"This is sufficient to dispose of the case, and any observations on other points raised can have no binding authority."

I He then proceeded to discuss the effect of Article 17 in the following terms (at p. 248) :—

"I am satisfied . . . that the steps taken to put the nominees of the Bank on the Register were not in accordance with the terms of the article. This construction does not prevent a mortgage of the shares or their sale by

the mortgagee in default of payment of the mortgage debt. But the sale must be effected in accordance with the terms of the article. The Bank could have taken from the plaintiff letters addressed to the auditors and to the secretary respectively in blank, or they could have taken a power of attorney from the plaintiff to write such letters in his name and on his behalf. I do not think that the disregard of Article 17 rendered the transaction *ultra vires* the Company, or that it could not have been regularized by the assent of all the shareholders; but that assent was never obtained."

Atkin J. entertained doubts on the question of no effective demand but said (at p. 261) — and here he was clearly referring to the passage from the speech of the Lord Chancellor which has been quoted :—

"I found my own decision, however, on the grounds stated by the Lord Chancellor on the second point. The effect of Article 17 in my opinion is to provide the means and the only means by which a member of the company can form an agreement for the sale of shares, which can only be constituted by the act of the secretary as agent for seller and purchaser declaring a contract to be concluded at the price fixed by the auditor. That was not done in this case and, in my opinion no rights arose between the Bank and Harry Hunter under any contract of sale either equitable or legal."

From the facts of the case as have been set out, it is clear that when Atkin J. said that no rights arose between the bank and Harry Hunter under any contract of sale, his reason for saying so was not that the contract of sale between the Bank and Harry Hunter was made otherwise than in accordance with the provisions of Article 17, for as was said by the Lord Chancellor (at p. 241) with regard to that sale: "the steps required to be taken by a member desirous of selling his shares were all taken in regular form" His reason must have been, and it must be borne in mind that he was expressing himself as in agreement with the views of the Lord Chancellor, that the steps in question could only be taken by a member of the company and that, by reason of non-compliance with Article 17 in relation to the original transfer from the plaintiff to the Bank, the Bank was not a member of the company as was pointed out by the Lord Chancellor.

The original transaction between the plaintiff and the Bank was a mortgage, and the Bank treated it as a mortgage of the legal interest in the shares, that is to say, on the basis that nothing remained in the plaintiff save the equity of redemption. The Bank had had itself put on the Register, and then as a member of the company had purported to sell the legal interest in the shares to Harry Hunter in accordance with the provisions of Article 17. And, of course, when it was held that it had not become a member, its title to do so fell to the ground.

In the circumstances, it seems to me to be going too far to read into the words of Lord Atkin any opinion to the effect that equitable rights in the shares can only be dealt with in accordance with Article 17.

A Indeed, if any such opinion had been held, it would have been expressed, for the Lord Chancellor had already said (at p. 249):—

B "If the Bank had been selling the equitable interest of the plaintiff in the shares, none of the provisions of Article 17 as to the restriction on the possible purchasers or as to the method of fixing a price, would have been effective; it would have been quite a different transaction from a sale of the shares."

C And Lord Blanesburgh had said (at p. 259) that a sale by the Bank of the equitable rights in the shares "might have been made to any one at any price". that is to say, free from the restrictions of Article 17. And it is significant that both he and Lord Russell of Killowen refused to uphold the construction which the Court of Appeal had placed on the transaction between the Bank and Harry Hunter as a sale of equitable rights mainly because it was a sale by a mortgagee to a party whose purchase was being in effect financed by the same mortgagee and by selling in accordance with the provisions of Article 17, that at a price fixed by the auditor, a lower price was obtained and was thus available to reduce the mortgage debt than would have been obtained if what had been sold was the equitable rights only, which would have been free from the restriction of a fixed price and would probably have fetched a higher price in the open market.

E In effect, it seems clear that in so far as the case of *Hunter v. Hunter*<sup>(2)</sup> is authority for anything in connection with the sale of shares in a private company of the description, it is authority for the proposition that while legal rights can only be transferred in accordance with the restrictions contained in the Articles, these restrictions do not affect the transfer of equitable rights.

G I now turn to the case of *Hawks v. McArthur*<sup>(1)</sup>. In that case the first defendant was a shareholder in a company whose articles contained an article similar to Article 20 of the United Traction Company Limited and to Article 17 of the Hunter company. He agreed to sell his shares to the second and third defendants, and on being paid the full purchase price executed transfers of the shares in favour of the second and third defendants without complying with the provisions of the relevant article. These transfers were not registered. Some time later, a judgment-creditor of the first defendant (the plaintiff Hawks) obtained a charging order *nisi* by way of execution on the first defendant's shares which were still standing in his name in the Register of the company.

I Vaisey J. considered the case of *Hunter v. Hunter*<sup>(2)</sup> and pointed out that the facts there were not the same as those before him and that in his opinion the basic difference was that in *Hunter v. Hunter*<sup>(2)</sup> the sale was by a mortgagee.

In that connection he referred to the Irish case of *Re Hafner*<sup>(3)</sup> in which Black J. in the Court of First Instance in Ireland, considered that the fact that *Hunter v. Hunter*<sup>(2)</sup> was dealing with the sale by a mortgagee was of the first importance, and that the case must be read with that characteristic in mind. He then quoted the passage in the speech of Lord Atkin, which has already been quoted here, and went on to say :—

"I find the very greatest difficulty in seeing how I ought to apply the decision in *Hunter v. Hunter* to the facts of this case. On general principles, in such circumstances as those of the present case, where a man who has an interest in shares in a company receives something for the sale of those shares and executes under seal a transfer of those shares for that purpose I cannot bring myself to suppose that *Hunter v. Hunter* constrains me to hold that everything done in that transaction is a complete nullity."

He went on to hold that if the second and third defendants had any rights, these rights were equitable rights, that they had some rights and that these equitable rights being prior in time should prevail over the quasi-equitable rights of the plaintiff under the charging order.

The only material difference between the facts in *Hawks v. McArthur*<sup>(1)</sup> and the present case is that in *Hawks v. McArthur*<sup>(1)</sup> the first defendant executed transfers in favour of the second and third defendants, whereas in the present case what the defendant did was to hand over the document of title to the shares. In both cases the price of the shares was paid in full. In *Hawks v. McArthur*<sup>(1)</sup> agreements between the first defendant on the one hand and the second and third defendants on the other hand for the sale of the shares were never proved but were assumed to exist. In the present case, the agreement between the parties was proved and it was for the sale of the shares. Even if it be assumed for the sake of argument that, considered as an agreement for the sale of the whole right, title and interest in the shares, it is void by reason of Article 20, that does not prevent its being looked at as evidence of the intention with which the defendant handed over the document of title to the shares. And to my mind thus regarded and in the light of the consideration that the full amount of the purchase money mentioned in it was paid, I can only regard it as shewing an intention to assign to the plaintiff the beneficial interest in the shares. It is true that the subsequent conduct of the defendant showed a very strong intention not to part with any interest in the shares but, clearly, that must be regarded as a change of intention on his part. And when a man

freely enters into an agreement to sell something, he must be assumed at the time to have the intention of doing what he has agreed to do. The fact that he repents at a later stage does not justify him in disregarding his agreement and does not justify a Court in accepting that he never had any intention of doing what he agreed to do or in allowing it to lie in his mouth to make any such assertion. If this were so the law of contract would become the law of the jungle.

I am compelled, then, to the conclusion that there was an assignment by the defendant to the plaintiff of the equitable interest in the shares and that the plaintiff was, therefore, entitled to a declaration in the terms allowed by the trial Judge.

I would add that I am quite frankly basing myself on *Hawks v. McArthur*<sup>(1)</sup>. If that case was wrongly decided, then I am wrong in my view of the present case. I am, however, fortified in the view I have taken by the case of *Harrold v. Plenty*<sup>(4)</sup> where it was held that the deposit by way of security of a share certificate without an accompanying signed transfer amounted to an equitable mortgage. In all the circumstances of the case, I would dismiss the appeal.

The appeal is, however, going to be allowed and as there is a difference of opinion on the question of costs, I am compelled to express my opinion on that question. I see nothing in the conduct of either of the parties that would justify a departure from the ordinary rule that costs here and in the Court below should follow the event.

**Whyatt C.J. (S.)** :— This is an appeal from a judgment of Mr. Justice Rigby in which it was decided that the defendant is trustee for the plaintiff of 2,340 shares in the United Traction Co. Ltd. and is liable to account for the dividends received from these shares since the 4th February 1950.

The facts of this case, so far as material, may be briefly summarised. On the 28th January 1950 the plaintiff and the defendant entered into an agreement whereby the defendant agreed to sell to the plaintiff his holding of 2,340 shares in the United Traction Company Limited for the sum of \$46,800. It was a term of the agreement that the plaintiff should pay the purchase money within two months and that the defendant should transfer the shares within the same period; provision was made in the agreement for payment of liquidated damages in the event of either party failing

to perform his part of the agreement. As the United Traction Co. Ltd. is a private limited company, its articles of association (in particular article 20) contain restrictions on the transfer of shares, the effect of which is to require a proposing transferor to give notice to the company of his intention to transfer his shares, and thereafter to constitute the company his agent to sell the shares to other members of the company or other persons selected by the company, at a value fixed by the auditors, and only if the company fails to find a purchaser, is the proposing transferor at liberty to sell his shares to any person at any price.

Both the plaintiff and the defendant were fully aware of these restrictions in the articles of the Company but for some reason which has not been explained, they chose to ignore them when they entered into the agreement of the 28th January 1950 for the sale of these particular shares. The plaintiff duly paid the purchase money on 4th February 1950 and at some date which does not precisely appear in the record of the proceedings the defendant handed to him share certificate No. 5 in respect of these shares. The defendant has throughout refused to execute a transfer of the shares and on the 21st August 1953, his solicitors wrote to the plaintiff stating that as the agreement for the sale of the shares was contrary to the articles of association, it was bad in law and therefore the defendant would not transfer the shares but would return the purchase price of \$46,800. The plaintiff however, refused to accept the return of the purchase price. Eventually the defendant's solicitors wrote to the plaintiff on the 25th September 1953 saying that as the plaintiff would not receive back the sum of \$46,800, the defendant would deposit it in his solicitor's "clients' account", ready for payment to the plaintiff when he changed his mind and upon return of share certificate No. 5. After further correspondence, the plaintiff instituted the present proceedings, claiming that the defendant is a trustee of the shares for him and is liable to account to him for all the dividends paid in respect of the shares since the date of the agreement for sale, namely the 28th January 1950.

The first question to be considered on these facts is whether the agreement of the 28th January 1950 for the sale of these shares was, as the defendant contends, a void contract or whether it was, as the learned trial Judge found, a valid and binding contract. It is to be observed that the agreement purported to be an agreement for the sale of the whole of the defendant's

interest, legal and equitable, in these shares. If it had been an agreement to sell only the equitable interest, no difficulty would have arisen because none of the restrictive provisions of the articles of association, in particular, of article 20, apply to the sale of equitable interests in the shares of this company. As was said by Lord Hailsham in *Hunter v. Hunter*<sup>(2)</sup> (at page 249) when commenting on a restrictive article similar in character to article 20 "If the Bank had been selling the equitable interest of the plaintiff in the shares, none of the provisions of article 17 as to the restriction on possible purchasers or as to the method of fixing a price, would have been effective; it would have been quite a different transaction from a sale of the shares"; and Lord Russell of Killowen in the same case says at page 264, "Neither am I able to justify to myself the way in which the Court of Appeal have upheld what purported to be a sale of the legal and equitable interest in the shares at the restricted price enforced by the articles (and necessarily at that price) as a sale of the equitable interest only which, if permissible, would not be in any way subject to these restrictions but open to free competition".

It is clear, therefore, that the agreement of the 28th January must be regarded as an agreement by the defendant to sell the whole of his interest, legal and equitable, in 2,340 shares which were subject to the restrictions imposed by article 20. Restrictions imposed on the sale of shares by articles of association have been described by Mr. Justice Farwell in *Borland's Trustee v. Steel Brothers & Co. Ltd.*<sup>(5)</sup> as "one of the original incidents of the shares" and the question is whether an agreement which ignores these incidents and treats the shares as if they were the objects of absolute ownership with no fetters of any kind on alienation is in law valid and binding. Lord Atkin considered this point in *Hunter v. Hunter*<sup>(2)</sup>, *supra*, at page 261 and expressed himself thus: "The effect of article 17 (which was an article imposing restrictions on sale) in my opinion is to provide the means and the only means by which a member of the company can form an agreement for the sale of the shares, which can only be constituted by the act of the secretary as agent for the seller and the purchaser declaring a contract to be concluded at the price fixed by the auditor. That was not done in this case, and in my opinion no rights arose between the Bank and Harry Hunter under any contract of sale, either equitable or legal".

It is clear that Lord Atkin entertained no doubt that an agreement for the sale of shares in a private company which ignores the restrictions on sale imposed by the articles creates no rights, legal or equitable, in the parties to the agreement; in short the purported contract is void. This view is re-inforced, if indeed it is appropriate to speak of Lord Atkin's view on a matter of contract law in such terms, by the observations of Lord Greene in *Greenhalgh v. Mallard*<sup>(6)</sup> where he states that if certain articles of association restricting the sales of shares are to be read as of general application to all sales, whether to members or non-members, it is "a condition of the validity of any transfer, whether to a member or a non-member, that the shares shall in the first instance have been offered to the members as a whole in the manner specified in the paragraph". Accordingly, in my opinion, the agreement of the 28th January 1950 was void and no rights, legal or equitable, arose between the plaintiff and the defendant under it.

The next question to be considered is whether, notwithstanding that the agreement for sale was void, the defendant now holds these shares as trustee for the plaintiff. In reaching the conclusion that the defendant is trustee for the plaintiff, the learned trial Judge relied strongly, indeed it is probably correct to say, exclusively on the judgment of Mr. Justice Vaisey in *Hawks v. McArthur*<sup>(1)</sup>. In that case, as in the present case, a shareholder in a private company, the articles of which contained stringent provisions restricting the transfer of its shares, entered into an agreement with other members for the sale of his shares without regard to the procedure laid down in the company's articles. The purchasers paid the full purchase price and the vendor executed transfers in their favour, but the shares remained registered in the name of the vendor. Shortly afterwards a judgment creditor of the vendor obtained a charging order against the shares and the issue which the Court had to decide was whether the vendor's equitable interest in the shares had passed to the purchasers so that the vendor no longer had any equitable interest in them on which the judgment creditor's charging order could operate. It was decided by Mr. Justice Vaisey that although the vendor remained the legal owner of the shares, his equitable interest in them had passed to the purchasers and consequently their equitable rights, being prior in point of time, must prevail over the subsequent claim of the judgment creditor.

A The facts of *Hawks v. McArthur*<sup>(1)</sup>, *supra*, are similar in many respects to the facts of the present case, but it is, of course, necessary to examine the principles underlying that decision before deciding whether it governs this case. In the course of his judgment Mr. Justice Vaisey quoted the passage from Lord Atkin's judgment in *Hunter v. Hunter*<sup>(2)</sup>, *supra*, which I have already cited and said that it might seem to be conclusive in favour of the plaintiff. The learned Judge went on to say, however, that he could not bring himself to suppose that *Hunter v. Hunter*<sup>(2)</sup> C *supra*, constrained him to hold that everything done in the transaction he was considering was a complete nullity. He then proceeded to develop this view in the following words: "The one thing, however, which seems to me to be important is that they (the purchasers) paid Mr. McArthur the money, and I cannot bring myself to suppose that they got nothing D by their bargain and that the whole property in the shares remained in Mr. McArthur, notwithstanding the transfer which had been executed and the money which he received."

E It appears to me, with the greatest respect, that these dicta do not greatly illuminate the principles on which the learned Judge founded his judgment. Be that as it may, it is necessary, as I have already said, to ascertain the underlying principles of Mr. Justice Vaisey's decision in order to decide whether *Hawks v. McArthur*<sup>(1)</sup> F governs the present case. The first possibility is that the learned Judge regarded the relation between the vendor and purchasers of these shares as analogous to that which exists between the vendor and purchaser of land where, in the eye of a Court of equity, the vendor is trustee of the property and the purchaser is the beneficial owner pending completion of the sale. I have no hesitation, however, in rejecting this possibility for two reasons: first, a constructive trust only arises in a contract of a sale G which a Court of equity would specifically perform and in the case of a sale of shares in a private company contrary to the articles of associations, no Court would decree specific performance; and secondly, the learned Judge could not have proceeded on the basis that the agreement for sale constituted a binding contract, since this would have meant that he differed from Lord Atkin's view whereas in fact he stated that he looked I to the speeches in *Hunter v. Hunter*<sup>(2)</sup> for guidance.

The second possibility, it seems to me, is that the learned Judge, while accepting the view that the agreement for the sale of the whole of the vendor's

interest, legal and equitable, in the shares was void, considered nevertheless that it might be treated as a valid sale of the equitable interests only, in which case, of course, the restrictive provisions of the articles would not apply and the equitable interest would pass from vendor to purchaser. I reject this possibility also for the reason that it would involve imposing on the parties a sale of a kind which they never even purported to make. When an attempt was made by the Court of Appeal in *Hunter v. Hunter*<sup>(2)</sup>, *supra*, to substitute for the abortive sale by the mortgagees of their legal and equitable interest in the shares, a sale of the equitable interest only, the House of Lords disapproved. In the words of Lord Russell of Killowen at page 264, "Neither am I able to justify to myself the way in which the Court of Appeal have upheld what purported to be a sale of the legal and equitable interests in the shares . . . as a sale of the equitable interest only . . ."; similarly, Lord Blanesburgh at page 260, "In other words, the Bank by order of the Court of Appeal have, *ex post facto*, been fixed with a contract . . . which I make bold to say they would never have concluded at that date . . .". So in the case of *Hawks v. McArthur*<sup>(1)</sup>, *supra*, it would have been imposing a new contract on the parties to have treated the agreement for the sale of the shares as an agreement for the sale of only the equitable interests in the shares.

There remains, however, one further possibility to be considered in relation to Mr. Justice Vaisey's reasoning in *Hawks v. McArthur*<sup>(1)</sup>, *supra*: even if there was no valid binding agreement for the sale of the vendor's interest, legal or equitable, in the shares, the relation of trustee and *cestui que* trust might nevertheless have come into existence from something outside and beyond the mere agreement. This is well illustrated by the observations of Mr. Justice Chitty in *Loring v. Davis*<sup>(7)</sup> (at page 634): "I put a simple case," he says; "If a man makes a transfer, there being no previous contract whatever, and executes a transfer to another of shares or stock, on the face of the transfer it is a sale, and if the intended transferee pays the purchase money upon the transfers, and takes the transfer into his own possession and keeps it, has not the transferee by thus accepting the transfer of the shares, as between himself and the transferor, become the equitable owner of the shares, and that notwithstanding that the transferee does not execute the transfer?" It will be observed that Mr. Justice Chitty postulates a case where there has been

A no previous contract whatever, and yet, the relation of trustee and *cestui que* trust comes into existence when the transferor executes a transfer of shares to another and the intended transferee pays the purchase money and takes the transfer into his possession. That is precisely what happened in *Hawks v. McArthur*<sup>(1)</sup>, *supra*. The transferor, McArthur, executed a transfer of the shares and the intended transferees paid the purchase money to the transferor. It follows, therefore, on the principle so clearly expressed by Mr. Justice Chitty in *Loring v. Davis*<sup>(7)</sup>, *supra*, that the transferees thereupon became the equitable owners of the shares.

It remains finally to consider whether this principle which fits the facts of *Hawks v. McArthur*<sup>(1)</sup>, *supra* also fits the facts of the present case. It is true that the plaintiff paid the defendant the full amount of the purchase price, as did the purchasers in *Hawks v. McArthur*<sup>(1)</sup>, *supra*, but unlike the vendors in that case, the defendant did not, either at the time he received the purchase money or at any other time, execute an instrument of transfer. Such an instrument, if one had been executed by the defendant, would no doubt have followed the usual or common form, and would have stated on the face of it that the defendant, in consideration of the sum of \$46,800 paid to him by the plaintiff, thereby transferred to the plaintiff 2,340 shares in the United Traction Co. Ltd. to hold the same unto the transferee subject to the same conditions as he held them. But no such instrument was ever executed by the defendant; on the contrary, he consistently and repeatedly refused to take any steps to execute a transfer of the shares to the plaintiff. This, in my opinion, is a vital distinction between *Hawks v. McArthur*<sup>(1)</sup>, *supra*, and the present case. In the former case it could be inferred, without relying on any previous contract, that a constructive or implied trust had come into existence since McArthur had executed instruments of transfer which *ex facie* effected a sale in favour of the intended transferees; but in the present case, there is no similar instrument and therefore no such inference can arise. I should perhaps add that the plaintiff did not seek to argue that the handing over of the share certificate could, by itself, have made him equitable owner of the shares if the agreement of the 28th January was a nullity. Such a contention would, of course, be going beyond anything decided in *Loring v. Davis*<sup>(7)</sup>, *supra*, and *Hawks v. McArthur*<sup>(1)</sup>, *supra*, and would involve the proposition that the mere delivery of a share certificate against

payment of a sum of money where there is no valid antecedent contract of sale, *ex opere operato* creates a constructive trust and makes the registered owner of the shares a bare trustee for the person holding the certificate; in my opinion there is no foundation in principle or authority for such a proposition.

Accordingly, therefore, I am of the opinion that no constructive or implied trust was created by anything *dehors* the void agreement of the 28th January and therefore the defendant does not hold these shares as trustee for the plaintiff. In reaching this conclusion I fully endorse the criticisms by Mr. Justice Vaisey in *Hawks v. McArthur*<sup>(1)</sup>, *supra*, of the conduct of members of a private company who disregard the articles of association by which they and other members are bound, as the plaintiff and defendant did in this case. Mr. Justice Vaisey described such conduct as "almost scandalous" and he would have been content, if the law had permitted it, to have reached the conclusion that the purchasers had not acquired any equitable rights as a result of their reprehensible behaviour. In the present case, it may be some consolation to the other shareholders in the company to know that the parties to these proceedings who ignored their rights in such a scandalous way, have not, in the end, gained any advantage by doing so.

For these reasons, I would allow this appeal with costs here and in the Court below.

**Hill J.:**—In the lower Court the plaintiff/respondent's substantial claim was originally for specific performance of an option to purchase given by the defendant/appellant to sell to him 2,340 shares in the United Traction Company Ltd. The option was duly exercised.

It is necessary to set out fully the facts found by the learned trial Judge. These were as follows:—

"In 1950, the Plaintiff and the Defendant were directors and founder members of the United Traction Co. Ltd., a private Company limited by shares and incorporated in September, 1947. The issued capital of the Company was then 12,000 \$10 shares, of which the Plaintiff and the Defendant each held 2,340 shares.

On the 16th January, 1950 the Defendant gave to the Plaintiff an option in writing offering to sell him his 2,340 shares for the sum of \$46,800. The option was to be valid till the 30th January, 1950.

In furtherance of the exercise of that option, on the 28th January, 1950, the parties entered into a formal contract in writing, whereunder the Defendant received from the plaintiff the sum of \$8,000 as an advance payment, and it was further agreed that the balance of \$38,800 was to be paid within two months i.e. before the 28th March, 1950. The contract further contained reference to agreed sums of money to be paid by way of liquidated damages in the event of either party failing to complete his part of the agreement. Having regard to the view I take of this case it is unnecessary for me to refer any further to those damages.

A It is admitted that the Defendant received the balance of the purchase price within the time limit stipulated, and it is admitted that, for reasons to which I shall refer, the defendant failed to transfer, or secure the transfer of, those shares into the Plaintiff's name.

B It is abundantly clear that thereafter the affairs of the Company flourished and prospered and the dividends paid to shareholders were such as must inevitably arouse the envy and admiration of even the most speculative of investors.

The Defendant, however, despite repeated requests from the Plaintiff, made no attempt to transfer the shares or to give notice in writing to the Company of his desire so to transfer them. He retained the shares, the dividends paid thereon, and the \$46,800 he had received as payment for the shares."

C It is clear that both parties were aware of Article 20 of the Articles of Association of the Company. This article enforces restrictions on the transfer of shares and requires an intending transferor to give notice to the Company of his intention to transfer his shares. The Company thereafter sells the shares to other shareholders or persons selected by the Company at a value fixed by the Auditors. It is only if the Company fails to find a purchaser that the intending transferor is able to sell his shares without restriction as to purchaser or price.

D In considering what remedy, if any, he should give to the plaintiff/respondent the learned trial Judge was of the opinion that it would be wholly inequitable for him to order specific performance of the contract of sale of the shares having regard to the rights and interests of the remaining shareholders as expressly prescribed by Article 20.

E On the other hand, the defendant/appellant having entered into a valid contract of sale and having received, and retained, the purchase price thereof, the learned Judge considered that it would be equally inequitable that the appellant, as against the purchaser, should retain the equitable interests arising from the shares.

G With the first of these two views I find myself in full accord. Holding these views and on his findings of fact the problem faced by the learned Judge was how to afford relief to the plaintiff/respondent and at the same time protect the interests and rights of the other shareholders.

H The solution found by the learned trial Judge, with consequential orders, was in the following declaration:—

I "That the defendant is and has been since the 4th day of February 1950 trustee for the Plaintiff of the 2,340 shares comprised in Certificate No. 5 and registered in the name of the defendant in the United Traction Company Limited and of all dividends and all other rights and benefits received or to be received hereafter by the defendant in respect of the said shares."

To put it succinctly I think that one of the tests of this declaration is whether or not it affects the

rights and interests of the other shareholders under Article 20. It could be said to do so, if the respondent, as a result of it, is in a position to compel the appellant to vote according to his wishes at meetings of the shareholders. No such right is specifically conferred in the judgment of the lower Court, though it might well be contended that it is included in the expression "All other rights", and it is a matter therefore for consideration whether such a right arises by implication or otherwise.

It does not appear that this aspect was argued or considered at the hearing. The law applied by the learned trial Judge to the circumstances of the case was that set out in *Halsbury's Law of England*, 3rd Edition, Volume 6 page 252 and set out by him in his written judgment. He also followed *Hanks v. McArthur*<sup>(1)</sup> because the salient facts of that case, and the principles of law arising therefrom in his view bore so much in common with this case and considered that the case of *Hunter v. Hunter*<sup>(2)</sup> which was relied on by the appellant in the Court below and before this Court is not applicable to a transfer of equitable and beneficial rights and should be distinguished.

To revert to the 'test' referred to above. I have not been able to find an authority bearing directly on the circumstances of the present case.

The judgment of the Court of Appeal in the case of *Greenhalgh v. Mallard*<sup>(6)</sup> avoided a decision on the principle involved here and I do not consider that it affords any real guidance.

It seems to me that in the absence of an express condition in the contract between the parties with regard to voting rights and in the absence of a specific direction by the Court, the respondent may not possess the right to compel the appellant to vote according to his wishes. I think he could only acquire such a right by applying to the Court for an appropriate order in the event of the appellant refusing to comply. It is difficult to foresee whether such an application would succeed or not. In the Air Mail Edition of the Times of 11th February, 1957, under the heading Lyle and Scott Interdict reference is made to a judgment by Lord Strachan, in the Court of Session, Edinburgh, granting an interim interdict to prevent votes being cast by proxies and to preserve the *status quo*. In this case too there was a breach of the Articles of Association and the fact that such a question is clearly in issue is something that does in my view materially affect the rights and interests of the other shareholders. For these reasons therefore I feel that some other remedy would in all the circumstances be more appropriate in the present case.

Moreover, it was not the intention of the parties that the appellant should sell only his equitable interest in the shares to the respondent.

The principles set out in the well known case of *Day v. Singleton*<sup>(8)</sup> with regard to the award of damages where the vendor fails to do his best to carry out his contract have frequently been applied by the local Courts particularly with regard to contracts for the transfer of undivided shares in land. Nevertheless I think *Day v. Singleton*<sup>(8)</sup> is difficult to apply to the present case for the following reasons. The appellant could only perform his part of the contract by following the procedure laid down in Article 20 referred to above. Nevertheless had the appellant taken all necessary steps it would have been by no means certain that the contract would have been fully performed. At best the respondent could only have been certain of obtaining a proportion of the appellant's shares in accordance with his holding in the Company and at a price fixed by the Auditor. Whether other shareholders would have taken up the shares available to them and what price the Auditor would have fixed is mere guesswork. This seems to me therefore to make the task of assessing damages well nigh impossible even if it was felt that the respondent was entitled to them. On this point and on the transaction generally my views are as follows: both men freely entered into the contract knowing the terms of the Company's Articles and that they were in fact committing a breach of their existing contracts under those Articles with the other shareholders. While it is true that the appellant took the respondent's money and retained it, is equally true that the respondent parted with his money willingly in what I think can fittingly be described as an immoral business transaction. He took a chance. The gamble failed and I do not consider that he has as a result become entitled legally or equitably to damages or to have the contract enforced wholly or partially.

I think he is entitled to get his money back and nothing else and that this appeal should be allowed and the judgment appealed against should be varied to a simple decree for the return of money paid and received, namely the sum of \$46,800. As this sum was paid into Court, I do not consider that the respondent should have the costs in the lower Court.

In view of almost scandalous conduct of both parties I consider that they should bear their own costs in this appeal and that the deposit should be returned to the appellant.

*Appeal allowed.*

Solicitors: *Ong Huck Lim & Co.; H. E. P. Powell & Co.*